BUMIPUTRA-COMMERCE BANK BHD

v.

TENGKU NGAH PUTRA TENGKU AHMAD TAJUDDIN & ORS

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[ORIGINATING SUMMONS NO: MT1-24-1022-01]
10 AUGUST 2002

LAND LAW: *Charge - Order for sale - Cause to the contrary - Whether established - Notice of demand - Claim for additional interest - Additional interest accumulated as a result of chargee bank's failure to make necessary deductions for loan repayment - Whether unjust to allow claim in view of chargee's negligence - Whether chargor had shown cause in equity - National Land Code, s. 256*

Pursuant to O. 83 r. 3 Rules of the High Court 1980, the plaintiff bank filed an originating summons against the defendants for the balance of a principal sum loan of RM93,112.98. An accrued sum of RM49,540.16 as at 6 April 2001 and increasing was also demanded. The gross figure demanded in the originating summons at that point of time was RM129,937. The issue was whether there was any cause to the contrary to reject the plaintiff's application for public auction of the defendants' property mortgaged under the loan. The defendants claimed that there was a wrongful computation of interest. As required under the loan agreement between the parties, the defendants had opened an account with the plaintiff and submitted a standing instruction to debit that account for monthly loan repayments. However, the plaintiff failed to make the necessary deductions. As a result of this negligence, the interest accumulated resulting in them having to pay the larger sum of RM129,937.

Held:

[1] The plaintiff was negligent and had failed to make the necessary deductions in the wake of the standing instructions. As a result of that negligence, apart from the principal sum remaining unchanged, minus what was paid earlier before the standing instruction was submitted, the interest accumulated. Due to this accumulation, when before the defendants were only required to pay RM93,112.98, now together with the accumulated interest they were lumbered with RM129,937, a larger sum than the original loan. (p 428 e-f)

[2] Despite the plaintiff's mistake, the plaintiff still pressurised the defendants to pay up the balance sum by recalling the loan. Not surprisingly, the defendants failed to come up with the sum in such a short span of time. As far as the plaintiff was concerned, that mistake had enriched it with the accumulation of interest at the expense and without the consent of the unfortunate defendants. The defendants were expected to shoulder unnecessary losses which were prejudicial to them, through no fault of theirs. This manner of enrichment was certainly unconscionable in the circumstances of the case and contrary to the rule of equity. (p 429 e-i)

[3] On the understanding of the current facts, read together with the views formulated in the case of *Low Lee Lian v. Ban Hin Lee*, any granting of an order of sale would certainly be wrong herein. The plaintiff was not entitled to that additional interest obtained through unconscionable enrichment. The notice of demand had become flawed, further to be repeated in the impugned Form 16D notice, thus making it ineffectual and invalid. (p 430 f)

[Application dismissed.]

Case(s) referred to:

Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 ***(refd)***

Kheng Soon Finance v. MK Retnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384 ***(refd)***

Low Lee Lian v. Ban Hin Lee [1997] 2 CLJ 36 ***(refd)***

Murugappa Chettiar v. Letchumanan Chettiar [1939] MLJ 296 ***(refd)***

Southern Bank Bhd v. Chuah Beng Hock [1999] 5 CLJ 620 ***(refd)***

Legislation referred to:

National Land Code, s. 256(2), (3)

Rules of the High Court 1980, O. 83 r. 3

For the plaintiff - Jagdeep Kaur; M/s Aziz & Mazlan

For the defendants - Burhanudeen Abd Wahid; M/s Burhan & Clemons

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar J:

The defendants, owners of a piece of property registered as PT 14076, HS (D) 62071, Mukim of Damansara, District of Klang, Negeri Selangor Darul Ehsan (hereinafter referred to as the said land), had mortgaged it in exchange for a bank loan of RM93,112.98 offered by the plaintiff. The offer was made *vide* a letter dated 11 November 1995 (AKH1), subject to interest of 1.7%

above the Base Lending Rate (BLR) of the plaintiff bank. A mortgage memorandum dated 16 December 1996 was subsequently registered on 27 December 1996.

According to the plaintiff, the defendants subsequently had failed to comply with the agreement as they had failed to pay up their monthly instalments, resulting in the issuance of a demand notice dated 27 May 2000 to the defendants (AKH3). Despite having received that notice, the defendants failed to comply with it, to be followed by a Form 16D notice pursuant to the National Land Code 1965 (hereinafter referred to as the Form 16D notice). In similar fashion the defendants refused to comply with that Form 16D notice. Pursuant to O. 83 r. 3 Rules of the High Court 1980, the originating summons were filed against them, praying for the balance of the principal sum (out of RM93,112.98) together with interest at 8.55 per year. Apart from the balance sum, an accrued sum of RM49,540.16 as from 6 April 2001 and increasing, was also demanded. The gross figure demanded in the originating summons at that point of time was RM129,937.

Before the hearing began, parties had agreed to narrow down the issues, and merely focus on the defendants' defence of whether there was 'cause to the contrary' that would oblige me to reject the application of public auction. Section 256(2) and (3) of the National Land Code 1965 read:

> (1) ...
>
> (2) Any application for an order for the sale under this Chapter by a chargee of any such land or lease shall be made to the court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.
>
> (3) On any such application, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

The Federal Court in *Kheng Soon Finance v. M.K. Retnam Holdings Sdn. Bhd. & Ors* [1983] 2 MLJ 384 had also occasion to say:

> It is clear that notwithstanding the proof of default by a chargor the chargee is not automatically entitled to an order for sale nor would the court without scrutiny allow the application. The court must decide whether there are **circumstances in the case** before it which would amount to a 'cause to the contrary' **within the meaning of subs. (3)** which would be sufficient in its opinion to refuse the chargee's application although the charge is lawfully and validly created and the chargor's default is proved. (emphasis added)

There were only two intertwined grounds ventilated by the defendants *viz*. the wrongful computation of the interest, and the non-compliance of the condition precedents provided for in the main agreement, by the plaintiff. Parties had agreed that under s. 5(a) of the agreement, the interest was to be calculated on a monthly rest basis, at the prevailing rate of 1.75% per annum above the bank's Base Lending Rate (BLR). The BLR then was 7.60% per annum. The bank was further entitled, as permitted by the agreement to change the BLR, hence the final figure of interest at the rate of 8.55% per year.

In the agreement, as per cl. 14, were included conditions precedent which were attached to the appendix. According to the appendix the defendants were required to open a savings/current account with the plaintiff, and thereafter submit a standing instruction to debit that account for the monthly loan repayment. It was not disputed that as on 31 January 1997 the defendants already had opened that account in the bank, to be followed in its wake by the necessary standing instruction on 12 September 1997. To reiterate and in addition to, the agreement was executed on 27 November 1995 and from that date until the standing instruction was given, the stipulated monthly payments were dutifully made by the defendants but by some other mode.

Come the standing instruction day the defendants stopped all payments. Thereafter the defendants reasonably assumed that the standings instructions were bethg carried out by the plaintiff, and thus left matters at that. As far as they were concerned they had fulfilled their part of the bargain. Unfortunately, as admitted by the plaintiff's counsel, the plaintiff was negligent and had failed to make the necessary deductions. As a result of that negligence, apart from the principal sum remaining unchanged, minus what was paid earlier before the standing instruction was submitted, the interest accumulated. Due to this accumulation, when before they were only required to pay RM93,112.98, now together with the accumulated interest they were lumbered with RM129,937 certainly a larger sum *vis-a-vis* the original loan.

In terms of the law, it is now trite that in order to deny the public auction of any property, a chargor will have to prove to the court that the chargee has no right to the sum in the originating summons. In a gist, it has to prove that cause to the contrary was in existence, *inter alia* by exposing the flaw in the Form 16D notice sent to it, the very foundation of the originating summons. The chargor could expose that flaw in the like of establishing the fact that the chargee was making demands for payments which it was not entitled to (*Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467).

In this current case, it could not be denied that due to the exigencies and requirement of the defendants, they had accepted the loan facilities offered by the plaintiff. Certainly before the offer was made by the plaintiff, the latter must have made a thorough study of the defendants' background, culminating with compromises and the execution of the agreement. Discussions between the parties must have been the order of the day, as it would be financially illogical for any bank, in this case the plaintiff, to offer any loan to the borrower, unless confident of the loan repayment. After being satisfied of the defendants' capacity to repay, then only will the loan be disbursed. Sensibly too, no borrower would submit to any loan facility that must necessarily stretch his financial capability beyond endurance, and eventually invite ruination to him. It is no secret to anybody that unless he is a totally irresponsible person, a borrower will invariably subject himself to some budgeting exercise, and in the process allocates a certain amount of money for the monthly repayment. Thus, the importance of the instalment amount could never be overly emphasised to a borrower, as any miscalculation or unforeseen addition will only add hardship, which will eventually derail his capability to pay.

In this case despite the plaintiff's mistake, which would certainly be a heavy burden to this unfortunate borrower, regretfully the plaintiff still pressurized the defendants to pay up the balance sum by recalling the loan. In these recessionary times, when only the cash rich can smile, the defendants were expected to magically come up with the lump sum of RM119,554.06 (as at the time of the demand notice), within fourteen days. Where are they to dig up that kind of money in such a short span of time? Not surprisingly they failed, hence this action. In fact, even if the bank had restructured the instalment payments based on this bloated and burdensome sum, will be like stealing from Paul to give to Peter. The end product will be that, either the defendants' families tighten their belts to a suffocating level, or surrender their roof. If a straw could break a camel's back, surely an unexpected larger sum to a man immobilized by a strict budget, would be debilitating. Either way, the defendants will suffer whilst the plaintiff who is the actual culprit, will always be in a 'win win' situation.

Let us look at the matter from a different perspective, particularly from the point of view of the plaintiff and equity. As far as the plaintiff was concerned, that mistake had enriched it with the accumulation of the interest, at the expense and without the consent of the unfortunate defendants. Now the defendants were expected to shoulder unnecessary losses which were prejudicial to them, through no fault of theirs (*Southern Bank Bhd v. Chuah Beng Hock* [1999] 5 CLJ 620). This manner of enrichment was certainly unconscionable in the circumstances of the case and contrary to the rule of equity (*Low Lee*

Lian v. Ban Hin Lee [1997] 2 CLJ 36). In the latter case the Court of Appeal had occasion to enunciate, as sufficiently enumerated under held, that a chargor may show cause to the contrary under s. 256(3) of the Code by:

i. demonstrating that the charge is defeasible upon one or more of the grounds specified under sub-ss. (2) and (4)(b) of the said 256;

ii. by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order of sale, such as failure to make a demand or service of a notice in Form 16D, **or that the notice demands sums not lawfully due from the charge**; or

iii. **by demonstrating that its grant would be contrary to some rule of law or equity.** (emphasis added)

The above case had adverted to the case of *Murugappa Chettiar v. Letchumanan Chettiar* [1939] MLJ 296, before enunciating the third consideration, whereat in the latter case the court had remarked:

> ... a chargor may 'shew cause' **either in law or equity** against an application for an order for sale, and that the Court should refuse to make an order in every case where it would be **unjust to do so**. By 'unjust' I mean contrary to those rules of the common law and **equity** ... (emphasis added)

On the understanding of the current facts, read together with the views formulated in held 2 and 3 of *Low Lee Lian v. Ban Hin Lee (supra)*, any granting of an order of sale would certainly be wrong here. As the plaintiff was not entitled to the additional interest, obtained through unconscionable enrichment, it thus was not entitled to that extra payment. Just on that substantive premise the notice of demand had become flawed, further to be repeated in the impugned Form 16D notice, thus making it ineffectual and invalid. With the amount indicated in the Form 16D notice being wrong, and in the circumstances of the case a wrongful demand for payment, it would be as good as if no notice had been sent to the defendants. Apart from the issue of the non-compliance with a procedural requirement, there was also the issue of unconscionable enrichment on the part of the plaintiff, which was contrary to equity. If I may add, one ground would have been sufficient for me to reject the application, let alone two.

I was aware of the pragmatic views of the Court of Appeal pertaining to the breaches committed by lenders, and the desire for financial stability in the prevailing climate, but as the facts here were distinguishable, I had not shirked from deciding in favour of the borrower. I could not turn a blind eye to the poverty of professionalism on the part of such a powerful institution backed

by money and the best brains, and abandon justice along the way merely to cater to the needs of the business community, at the expense of the rights of the innocent 'little man', in this case the defendants. At the end of the hearing I had no hesitation in dismissing the application with costs.